
CALIFORNIA'S INEQUITABLE PAROLE SYSTEM: A PROPOSAL TO REESTABLISH FAIRNESS

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I. INTRODUCTION

Dana Hill is currently serving fifteen years to life in a California prison,¹ and for the past few years, she has struggled to convince the Board of Prison Terms² (“Board”) and the Governor³ that she is suitable for parole and ready to reenter society. Dana is but one victim of modern parole, a draconian system used as a mechanism of enforcing retributive principles.⁴ Modern parole falls far short of achieving the goals of rehabilitation and reintegration for which it was created.⁵

When Dana was a child, her stepfather was physically abusive, and for her own safety, she left her family’s home at the age of fifteen.⁶ She served a two-year stint in the Navy, beginning at age seventeen. Shortly after being discharged, she befriended her codefendant, Keith Chandler, who

* Class of 2005, University of Southern California Gould School of Law; B.S. 2002, University of Arizona. This Note is dedicated to my late father, Ralph. You will always be my inspiration. I would like to thank my family, especially Andrew, for your help and support. I would also like to thank Michael Brennan for all of your advice and guidance, the Post Conviction Justice Project, and the *Southern California Law Review* for all of your hard work. Finally, I would like to thank Dana Hill for allowing me to use your story.

1. Dana Hill is currently incarcerated at the California Institution for Women. Petition for Writ of Habeas Corpus at 1, *Hill v. Dovey*, No. 7859 (Cal. Super. Ct. May 28, 2004) (on file with author) [hereinafter *Habeas Petition*].

2. The Board is responsible for determining the parole suitability of inmates serving indeterminate sentences. *See* CAL. PENAL CODE §§ 3040–3041 (West 2004).

3. In California, the Governor has the power to review the Board’s findings regarding parole suitability. *See* CAL. CONST. art. V, § 8(b).

4. *See id.*

5. *See* HOWARD ABADINSKY, *PROBATION AND PAROLE: THEORY AND PRACTICE* 240 (5th ed. 1994).

6. *Habeas Petition*, *supra* note 1, at 4.

introduced her to cocaine.⁷ Addicted to cocaine and in need of money, Dana met a man named Marion Canter, who had “both money and a preference for young women.”⁸ Shortly after they met, Canter began to pay Dana’s expenses and to allow her to live with him, rent-free, until they had a disagreement and he abruptly evicted her.⁹ In need of money, Dana, along with Chandler and another person, devised a plan to rob Canter.¹⁰ During the robbery, Dana’s codefendants insisted that she hit Canter over the head to subdue him, but the one blow that Dana inflicted was insufficient to render Canter unconscious.¹¹ After Dana struck Canter, her codefendants wrestled him to the bed and proceeded to strangle him with an electrical cord. Frightened by her codefendants’ actions, Dana left the room, and when she returned five to ten minutes later, her codefendants were in the final stages of strangling Canter. About two weeks later, Dana turned herself over to the police department and cooperated in the investigation.¹² In 1984, Dana pleaded guilty to second-degree felony murder for her involvement in Canter’s death.¹³

Dana became eligible for parole in 1991.¹⁴ In 2001, the Board denied her parole and one of the panel commissioners stated that his only reason for finding unsuitability was the gravity of her offense. In 2003, however, the Board found Dana suitable for parole, citing her involvement in numerous self-help groups, including Alcoholics Anonymous and Narcotics Anonymous.¹⁵ They also noted that she “shows signs of remorse[,] . . . understands the nature and magnitude of the offense and accepts responsibility for her criminal behavior.”¹⁶ But Governor Gray Davis reversed the Board’s decision, stating that she had committed an “especially heinous murder that demonstrated utter disregard for human suffering.”¹⁷

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at Ex. A at 9–10.

11. *Id.* at 5.

12. *Id.*

13. *See* Habeas Petition, *supra* note 1 at 4–5.

14. *Id.* at Ex. D. at 26.

15. *Id.* at Ex. E. at 34.

16. *Id.* at Ex. E. at 33–34.

17. *Id.* at Ex. F.

Again in 2004, the Board found Dana suitable for parole.¹⁸ As in 2003, the Board noted her significant participation in self-help therapy and educational programming. The Board also recognized her “desire to change towards good citizenship” and her signs of remorse for her crime.¹⁹ Additionally, the Board quoted Dr. Peter Hu, a prison staff psychiatrist, whose report stated that Dana was “truly remorseful” and had “shown significant motivation, improving herself not only through vocational pursuits but also through self-initiated efforts.”²⁰

Governor Arnold Schwarzenegger, however, ignored the Board’s findings and declared Dana unsuitable for release based on the severity of her offense.²¹ Schwarzenegger found that Dana posed an unreasonable risk to society because her crime “demonstrated an exceptionally callous disregard for [human] suffering” and “went beyond the minimum necessary to sustain a conviction for second-degree murder.”²² Although Schwarzenegger acknowledged Dana’s work to rehabilitate herself, he ultimately concluded that “the especially grave murder committed by Ms. Hill presently outweighs the positive factors.”²³ In repeatedly reversing the Board’s decisions, Davis and Schwarzenegger both ignored the person Dana had become, and put undue weight on an offense that was committed decades ago, under extremely different circumstances.

Dana is only one of many victims of the California parole system. There are over 27,000 inmates incarcerated within California’s institutions who are serving life sentences with the possibility of parole.²⁴ Many of these inmates are currently eligible for parole.²⁵ Yet in order to reenter society, they must convince the Board and the Governor (collectively, “decisionmakers”) that they would pose no danger to society if released.²⁶

18. See Arnold Schwarzenegger, Governor, State of California, Indeterminate Sentence Parole Release Review, Dana Hill, W-20808 (Oct. 15, 2004) (on file with author) [hereinafter Release Review].

19. *In re* Life Term Parole Consideration Hearing of Dana Hill at 96 (May 21, 2004) (on file with author) [hereinafter Hill Hearing].

20. *Id.* at 98.

21. Release Review, *supra* note 18.

22. *Id.*

23. *Id.*

24. See Cal. Dep’t of Corr., Facts and Figures, First Quarter 2005, http://www.corr.ca.gov/CommunicationsOffice/facts_figures.asp (last visited Oct. 2, 2005).

25. Edward R. Hammock & James F. Seelandt, *New York’s Sentencing and Parole Law: An Unanticipated and Unacceptable Distortion of the Parole Boards’ Discretion*, 13 ST. JOHN’S J. LEGAL COMMENT. 527, 528 (1999).

26. See CAL. PENAL CODE § 3041 (West 2004).

Over the past few years this has been nearly impossible to do because the parole system has become unmanageable, unworkable, and unfair.²⁷

Each year, the Board conducts approximately 4000 parole hearings but grants parole in less than one percent of those cases.²⁸ Out of the 350 inmates who were convicted of murder and granted parole by the Board, only six were approved for parole by Davis in his nearly five years in office.²⁹ Franklin Zimring, a criminal justice specialist at Boalt Hall School of Law, has said that “[t]he actuarial odds of a murderer getting a favorable parole recommendation are right up there with hitting the big prize in the California Lottery.”³⁰ In 2002, in *In re Rosenkrantz*, the California Supreme Court further exacerbated the parole crisis by holding that parole can be denied based solely on the severity of the commitment offense.³¹

This Note advocates a plan for restructuring the sentencing and parole process to remedy the current ills of the existing system and to ensure that no rehabilitated inmates are unnecessarily incarcerated beyond their parole eligibility dates. This Note proposes three major changes to the current system. First, the legislature should be responsible for creating a sentencing matrix that would contain the minimum sentences for each felony, while giving judges the flexibility to deviate from the matrix in certain circumstances. Second, the Board, when considering suitability, should be able to consider only rehabilitative, forward-looking factors, such as psychological reports, release plans, and programming. Third, the new system should eliminate the ability of the Governor to overturn a suitability finding of the Board. Although this Note uses the California parole system to illustrate the problems with one parole system, other jurisdictions could easily adopt the proposal to change their sentencing processes and parole suitability guidelines.³² Additionally, while this Note constrains its

27. State Senator Gloria Romero, the chairperson of the State Senate Committee on the California Correctional System, recognized this problem when she said that California needs to develop a “Corrections Department that corrects, not warehouses.” Jim Herron Zamora, *New Prisons Chief Eager to Overhaul Failing System*, S.F. CHRON., Jan. 8, 2004, at A17, available at 2004 WLNR 7638722.

28. Harriet Chiang, *Governor Paroles Killer—Apparent New Policy Schwarzenegger, Unlike Davis, Heeds Judgment of Board*, S.F. CHRON., Nov. 22, 2003, at A1, available at 2003 WLNR 8240296.

29. See David M. Drucker, *Schwarzenegger Granting Paroles*, TRI-VALLEY HERALD (Pleasanton, Cal.), Oct. 18, 2004. Although better than Davis, Schwarzenegger has affirmed only 60 of the 155 parole recommendations thus far in his administration. *Id.*

30. Mike McKee, *State’s Parole Policy Draws Judicial Heat*, THE RECORDER (S.F., Cal.), Dec. 20, 2001, at 1, available at 12/20/2001 RECORDER-SF 1 (Westlaw).

31. See *In re Rosenkrantz*, 59 P.3d 174, 222 (Cal. 2002).

32. This Note discusses California because it has the nation’s largest penal system and some of the country’s toughest sentencing laws. See Rene Sanchez, *California’s New Standard of Law and*

discussion to the crime of murder, it is equally applicable to all felonies that carry a life sentence under the California Penal Code.

Part II of this Note describes the two primary theories of punishment and John Rawls's hybrid theory of punishment. Part III explains the difference between determinate and indeterminate sentencing structures. It also discusses the origins of parole and how parole has transformed from a system grounded in rehabilitative ideals to a system of retributive standards. Part IV explains the sentencing and parole process, sentencing guidelines, and relevant case law within California.³³ Part V establishes and discusses the four major problems with the current California parole system. Part VI proposes a restructuring of the sentencing and parole systems to address the problems of modern parole and to realign parole with its original goals. Further, it discusses how the proposed system rectifies the problems of the old system and addresses the new system's potential weaknesses.

II. THEORIES OF PUNISHMENT

No discussion of the penal system should proceed without a basic explanation of the justifications for allowing the State to punish its citizens.³⁴ The two theories most commonly used to justify the State's infliction of punishment are utilitarianism and retributivism. In addition, John Rawls suggests a "hybrid theory" of punishment that combines aspects of utilitarian and retributive theories into one penal system.

A. UTILITARIANISM

Utilitarianism "justif[ies] punishment in reference to its effect on society at large."³⁵ Jeremy Bentham, the father of utilitarian theory, defined utility as "that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness . . . [or] to prevent the happening

Order; Willing to Support Parole, Schwarzenegger Is on Track to Review His First Death-Penalty Case, WASH. POST, Jan. 26, 2004, at A2.

33. Although parole boards in many different states consider the severity of the commitment offense when deciding suitability, this Note will use the California statutes and procedures as its model for parole.

34. This discussion serves to familiarize the reader with the basic arguments presented within each theory. It is not intended to serve as an in-depth analysis of theories of punishment.

35. COREY LANG BRETTSCHEIDER, PUNISHMENT, PROPERTY AND JUSTICE: PHILOSOPHICAL FOUNDATIONS OF THE DEATH PENALTY AND WELFARE CONTROVERSIES 51 (2001).

of mischief, pain, evil or unhappiness.”³⁶ The utilitarian theory of punishment holds that “all punishment is mischief: all punishment in itself is evil.”³⁷ Accordingly, the utilitarian theory of punishment is based on the idea that punishment is a necessary evil that can only be justified by the diminution of further crime. Utilitarianism reasons that “the evil inflicted by the offense often cannot be rectified, while future offenses . . . can always be prevented.”³⁸ A state’s intentional infliction of punishment on a specific person is justified because the punishment has consequences that are good for society to such a degree that they outweigh the negatives of imposing harm on the person being punished.³⁹

Within the general framework of utilitarian justification for punishment, there are three main justifications: incapacitation, deterrence, and rehabilitation.⁴⁰

1. Incapacitation

Incapacitation requires the removal from society of offenders who would have committed further offenses if left free.⁴¹ Removing an offender from free society reduces the crime rate by physically preventing the offender from committing crimes in that society.⁴² As researchers explain, “As long as the offenders who are imprisoned would have continued to commit crimes if they had remained free, there is a direct incapacitative effect: that is, the number of crimes at any time is reduced by the crimes avoided through the imprisonment of some criminals.”⁴³

2. Deterrence

Deterrence relies on the assumption that members of society are rational actors, who consider the benefits and consequences of criminal

36. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in JOHN STUART MILL & JEREMY BENTHAM, *UTILITARIANISM AND OTHER ESSAYS* 65, 66 (Alan Ryan ed., Penguin Books 1987); BRETTSCHEIDER, *supra* note 35, at 51.

37. FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 16 (1973) (quoting Bentham, *supra* note 36, at 97); Russell L. Christopher, *Detering Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 858–59 (2002).

38. *Id.* at 19.

39. See IGOR PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* 10 (1989).

40. See, e.g., Christopher, *supra* note 37, at 857.

41. See PANEL ON RESEARCH ON DETERRENT AND INCAPACITATIVE EFFECTS, NAT’L RESEARCH COUNCIL, *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES* 65 (1978) [hereinafter *DETERRENCE AND INCAPACITATION*].

42. See *id.* at 64.

43. *Id.* at 65.

activity before they commit crimes.⁴⁴ Under deterrence theory, a rational actor will follow the law because breaking the law has dire consequences.⁴⁵ Punishment is justified if it “sways the offender not to repeat the offense and, on the other hand, serves as a frightening example which checks the inclination of potential offenders in the public to violate the law.”⁴⁶

Deterrence can take two forms: general deterrence and specific deterrence. General deterrence stems from the idea that “human behavior can be influenced by incentives . . . [and] that sanctions are negative inducements and that their imposition on detected offenders serves to discourage at least some others from engaging in similar pursuits.”⁴⁷ General deterrence justifies society’s punishment of individual offenders so that “other people contemplating similar acts will consider the likelihood of similar retaliation. . . . [It] assumes that potential offenders will be influenced by the experience of the punished offender in governing their future behavior.”⁴⁸

Specific deterrence justifies punishment by deterring recidivism in the particular punished individual.⁴⁹ The purpose of specific deterrence is to force offenders to consider the consequences of their prior criminal activity and to dissuade them from committing similar acts in the future.⁵⁰ One commentator explains that “[s]pecific deterrence assumes that the offender is a (sufficiently) rational actor to weigh the costs and benefits of committing crime and that the imposition of [past] painful consequences such as imprisonment will tip his cost-benefit analysis against future offending.”⁵¹

44. See Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 212 (2003) (explaining that for criminals, rational behavior requires assessing the “advantages and disadvantages of criminality”).

45. See RALPH D. ELLIS & CAROL S. ELLIS, *THEORIES OF CRIMINAL JUSTICE: A CRITICAL REAPPRAISAL* 4 (1989) (stating that “the main reason we obey the law is not that we are morally good, but that we are smart enough to calculate that the risks involved are not worth the gain”).

46. PRIMORATZ, *supra* note 39, at 11.

47. DETERRENCE AND INCAPACITATION, *supra* note 41, at 19.

48. DAVID DUFFEE & ROBERT FITCH, *AN INTRODUCTION TO CORRECTIONS: A POLICY AND SYSTEMS APPROACH* 3 (1976). The punishment of one offender will serve as a poignant example to other potential offenders of the negative effects of criminal activity, hopefully persuading them not to participate in illicit behavior. See Luna, *supra* note 44, at 209.

49. See BRETTSCHEIDER, *supra* note 35, at 27.

50. See DUFFEE & FITCH, *supra* note 48, at 3.

51. Luna, *supra* note 44, at 209.

3. Rehabilitation

The rehabilitation theory of punishment uses punishment as a means of “liberating [an offender] from his asocial and criminal habits and inclinations and making him fit to return among the honest, law-abiding citizens and to a normal, constructive social life.”⁵² It assumes that criminals are irrational or sick and can be cured using social, educational, and treatment programs while incarcerated.⁵³ Punishment is a means of altering criminals’ inclinations, motives, habits, and characters so that upon release they abide by the law—not out of fear, but because they are free from criminal inclinations and habits.⁵⁴

B. RETRIBUTIVISM

Unlike the utilitarian theory, the retributive theory is based on the belief that the imposition of punishment is not justified by its results, but rather because it is deserved by the offender.⁵⁵ Criminal sanctions address the past conduct of offenders, not their future actions.⁵⁶ Under retributivism, the justification for punishment can be explained as follows: “When society commits an act of retribution and punishes a criminal because he was wrong, the most logical explanation seems to be that social order is disturbed by the criminal act, and retribution is needed to restore that order.”⁵⁷

52. PRIMORATZ, *supra* note 39, at 11.

53. Cf. FREDERICK A. HUSSEY & DAVID E. DUFFEE, PROBATION, PAROLE, AND COMMUNITY FIELD SERVICES: POLICY, STRUCTURE, AND PROCESS 111 (1980).

54. PRIMORATZ, *supra* note 39, at 20.

55. See Christopher, *supra* note 37, at 847–48; PRIMORATZ, *supra* note 39, at 12. A commentator explains, “[r]etributionism is not concerned with the future welfare or present psychological state of the offender or the welfare of the community.” ROMAN TOMASIC & IAN DOBINSON, THE FAILURE OF IMPRISONMENT: AN AUSTRALIAN PERSPECTIVE 18 (1979).

56. See DUFFEE & FITCH, *supra* note 48, at 5. A retributivist uses a backward-looking perspective to punish offenders according to a strict exchange view, which treats offenders as responsible moral agents and thus rewards them when they make correct moral choices and punishes them when they do not. TOMASIC & DOBINSON, *supra* note 55, at 18. Retribution theory holds that “[t]he state of the affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not; and it is better irrespective of any of the consequences of punishing him.” John Rawls, *Two Concepts of Rules*, reprinted in PHILOSOPHY OF PUNISHMENT 38 (Robert M. Baird & Stuart E. Rosenbaum eds., 1988).

57. DUFFEE & FITCH, *supra* note 48, at 5.

C. JOHN RAWLS'S HYBRID THEORY OF PUNISHMENT

The thesis of John Rawls's hybrid theory is that the justification for the practice of punishment is different from the justification for punishing a specific person.⁵⁸ The theory holds:

[R]eproductivism criteria are necessary in deciding if an individual should be punished in the first place. Reproductivism is useful in "justifying a particular action" within the legal system. Utilitarianism, however, provides the justification for the entire system of punishment, including the use of reproductivism in deciding who is punished in the first place. Reproductivism is of use only because it results in long-term utility.⁵⁹

Rawls uses a hypothetical conversation between a father and his son to show that his thesis is based on society's moral intuitions:⁶⁰ "Suppose the son asks, 'Why was J put in jail yesterday?' The father answers, 'Because he robbed the bank at B. He was duly tried and found guilty. That's why he was put in jail yesterday.'"⁶¹ The child's question in this instance concerns the reason why the State is punishing one specific person rather than another.⁶² The answer is simple; the law, the judge, and the jury look back and punish people for crimes they committed.⁶³ Conversely, the child might ask: "Why do people put other people in jail?" Then the father might answer, 'To protect good people from bad people' or 'To stop people from doing things that would make it uneasy for all of us'⁶⁴ This question focuses on the justification for the institution of punishment.⁶⁵ It seeks, in part, to determine why society has jails in the first place. The answer rests on utilitarian theory, which justifies the institution of punishment by its benefits to society.⁶⁶

Rawls's hybrid theory, therefore, envisions a system in which the legislature creates a penal system based on utilitarian considerations while it allows judges to sentence convicted criminals using retributive principles—a system in which the judiciary's retributive approach is constrained by and dependent on the legislature's utilitarian system of

58. See *Introduction to PHILOSOPHY OF PUNISHMENT* 7, 10 (Robert M. Baird & Stuart E. Rosenbaum eds., 1988).

59. BRETTSCHEIDER, *supra* note 35, at 57. See Rawls, *supra* note 56, at 38.

60. See RAWLS, *supra* note 56, at 38.

61. See *id.*

62. *Id.* at 38–39. Essentially, a particular person is punished because that person is guilty of breaking the law. See *id.* at 39.

63. *Id.*

64. *Id.* at 38.

65. *Id.*; BRETTSCHEIDER, *supra* note 35, at 57.

66. See BRETTSCHEIDER, *supra* note 35, at 57; Rawls, *supra* note 56, at 38.

punishment.⁶⁷ A judge is only able to set a sentence that is within the constraints set by the legislature's utilitarian principles.⁶⁸ Although termed a hybrid theory, the utilitarian view is obviously fundamental to it because the retributivist principles can work only through a utilitarian framework.⁶⁹ As Rawls explained:

The decision whether or not to use law rather than some other mechanism of social control, and the decision as to what laws to have and what penalties to assign, may be settled by utilitarian arguments, but if one decides to have laws then one has decided on something whose working in particular cases is retributive in form.⁷⁰

The potential weakness of the hybrid theory, however, is that because utilitarian criteria determine the amount of punishment, there is nothing to prevent the legislature from imposing draconian and erratic punishment that would produce overwhelming societal benefit.⁷¹ For example, there is no constraint on the legislature if it decides that the punishment for a minor offense will be twenty-five years of incarceration.⁷²

III. POTENTIAL PUNISHMENT SCHEMES UNDER THE RAWLSIAN HYBRID THEORY

John Rawls's hybrid theory does not detail a method of executing his ideas. There are several different punishment schemes that can be implemented under the hybrid theory. The predominant mechanisms are discussed below.⁷³

A. DETERMINATE SENTENCING

Determinate sentencing, under the hybrid theory, requires judges to impose specific sentences and to prescribe the same term of incarceration

67. See BRETTSCHEIDER, *supra* note 35, at 58.

68. See Rawls, *supra* note 56, at 39.

69. See *id.*

70. *Id.*

71. See BRETTSCHEIDER, *supra* note 35, at 58.

72. If the punishment for petty theft were a sentence of twenty-five years in a state prison, then the deprivation of freedom for the one person punished would serve as an example for the rest of society, which would benefit significantly from the decrease in crime. Thus, the harsh punishment of twenty-five years of incarceration would be justifiable because the benefits of the punishment outweigh the negatives of punishing that individual person. See *also id.* at 25 (providing an example in which general deterrence principles are used to justify a sentence of five years imprisonment for illegal parking as a means of improving emergency services).

73. There are many types of alternative punishment schemes other than determinate and indeterminate sentencing that are beyond the scope of this Note.

for all persons convicted of similar crimes.⁷⁴ The State releases inmates from incarceration upon the expiration of their sentences. There are different types of determinate sentencing models, some that give little to no discretion to judges and some that give judges great discretion.⁷⁵ Judges, however, must give all persons convicted of similar offenses the same sentence. Thus, at least in theory, there should be no disparity in sentence lengths among inmates convicted of similar crimes.⁷⁶

B. INDETERMINATE SENTENCING AND THE CONCEPT OF PAROLE

Under indeterminate sentencing, a judge will impose a sentence that has both a minimum and a maximum term but no specific length.⁷⁷ This system stems from the belief that criminal tendencies are like an illness and that until prison officials deem an inmate cured, no release date should be set.⁷⁸ The effect of indeterminate sentencing is that persons convicted of similar offenses may receive different sentences.⁷⁹ The State releases an

74. See ABADINSKY, *supra* note 5, at 213–14. For example, all inmates convicted of first-degree murder would receive sentences of thirty years in prison.

75. See *id.* at 214–15.

76. Although, in theory, determinate sentencing was supposed to reduce gross disparities in sentence length for inmates who committed similar crimes, it has failed to do so. See *id.* at 216. No state has adopted a model of determinate sentencing that completely constrains a judge in the sentencing process; thus, two different judges might view certain aggravating and mitigating factors differently, resulting in grossly disproportionate sentences for similar crimes. See *id.* at 216–17. Additionally, a study of the Colorado determinate sentencing system proved that fixed sentencing did not reduce unwarranted variation in sentence length. See *id.* at 217 (citing Herbert C. Covey & Mary Mande, *Determinate Sentencing in Colorado*, 2 JUST. Q. 259, 270 (1985)).

77. See *id.* at 214. For example, the sentence for a person convicted of first-degree murder in a state that uses indeterminate sentencing could be a minimum of twenty-five years and a maximum of life in prison.

78. See DAVID T. STANLEY, *PRISONERS AMONG US: THE PROBLEM OF PAROLE* 21 (1976).

79. See ABADINSKY, *supra* note 5, at 214. Criminals convicted of minor crimes may be incarcerated for extended periods, while criminals convicted of serious crimes may serve short periods of incarceration. JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESSERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* 4 (1990). Critics of indeterminate sentencing and parole argue that gross disparity in sentencing is not justified. See ABADINSKY, *supra* note 5, at 214. Cf. HUSSEY & DUFFEE, *supra* note 59, at 116 (arguing that sentencing disparities were acceptable and even necessary to the operation of the rehabilitative ideal, but that now disparities have fallen out of favor and are seen as “a major problem in need of control”). Proponents of indeterminate sentencing, however, argue that equity in punishment derives not from sentence length but rather from the consistent application of sentencing principals and that “[e]quality in punishment is not an absolute principle” and “[t]here can be just sentences in which like offenders are not treated alike.” AUSTIN LOVEGROVE, *JUDICIAL DECISION MAKING, SENTENCING POLICY AND NUMERICAL GUIDANCE* 8 (1989). Inmates convicted of similar crimes might differ significantly in moral culpability and future dangerousness and would require different terms of incarceration to promote fairness and justice. See Eric P. Berlin, *Reducing Harm as a Determinative Factor: The Hidden Problem with Sentencing Entrapment*, 7 FED. SENT’G REP. 186, 186

inmate either at the expiration of the maximum term or when the state parole board decides that an inmate is suitable for parole and accordingly grants a release date.⁸⁰

1. Background on Parole

Parole is the restricted release of inmates prior to the expiration of their sentences.⁸¹ It is a means of helping parolees and supervising their adjustments to society, while also protecting the public.⁸² Historically, the rehabilitation and reintegration of the parolee into society were the goals of the parole system,⁸³ but modern parole no longer reflects these goals.

a. The History of Parole

Parole is “one of the most remarkable experiments in the history of penology.”⁸⁴ Alexander Maconochie, the superintendent of the British penal colony on Norfolk Island in 1840, created a philosophy of punishment based on the rehabilitation of the inmate.⁸⁵ Essentially, the State punished an inmate for the past while simultaneously training the inmate for the future.⁸⁶ The State did not release inmates until they had received a certain number of marks, which were awarded for good institutional behavior.⁸⁷

A reformatory in Elmira, New York was the first American institution to use a parole system.⁸⁸ The Elmira system was based on the following principles:

(1995). “[N]o two crimes, criminals, or victims will be identical, thereby defeating the entire project of treating like cases alike.” Luna, *supra* note 44, at 223.

80. See ABADINSKY, *supra* note 5, at 214.

81. *Id.* at 205. The U.S. Department of Justice’s Bureau of Justice Statistics defines parole as “a period of conditional supervised release following a prison term.” See Timothy A. Hughes, Doris James Wilson & Allen J. Beck, *Trends in State Parole, 1990–2000*, BUREAU JUST. STAT. SPECIAL REP., Oct. 2001, at 1, 2, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/tsp00.pdf>.

82. STANLEY, *supra* note 78, at 1.

83. See *id.* at 2; HUSSEY & DUFFEE, *supra* note 53, at 61 (stating that one of the formal goals of parole is the rehabilitation of the offender).

84. ABADINSKY, *supra* note 5, at 206.

85. *Id.*

86. *Id.*

87. *Id.* A few years later, the Irish Parliament introduced a similar system. Sir Walter Crofton, a follower of Maconochie’s penal reform, created a system that allowed for the release of inmates prior to the expiration of their sentences and put them under the supervision of local police. Similar to Maconochie’s system, to be eligible for parole under the Irish system, inmates needed to earn marks and show signs of reformation. *Id.* at 207.

88. *Id.* at 208. To be released by the state, inmates need to accumulate marks based on institutional conduct and progress in academic or vocational training. See *id.*

Criminals can be reformed; that reformation is the right of [convicts] and the duty of the State; that every prisoner must be individualized and given special treatment adapted to develop him to the point in which he is weak—physical, intellectual, or moral culture, in combination, but in varying proportions, according to the diagnosis of each case; that time must be given for the reformatory process to take effect, before allowing him to be sent away, uncured; that his cure is always facilitated by his cooperation, and often impossible without it.⁸⁹

The parole system was a success at the reformatory and the system was quickly implemented throughout the country.⁹⁰

b. Modern Parole

In the 1970s, numerous critics attacked parole systems.⁹¹ Many of these attacks, however, appear to have been politically motivated, rather than sincere attempts to address any of the problems with parole.⁹² Regardless, the parole board remains under a political spotlight. Because the social and political repercussions of releasing an inmate who then commits another crime are severe, avoidance of error is a predominant goal of parole officials.⁹³ This pressure forces parole boards to take a “when in doubt, keep [the inmate] in” stance.⁹⁴

The modern parole system has morphed from a rehabilitative mechanism into a form of deferred retributive sentencing.⁹⁵ The rehabilitation of inmates is no longer the main concern of parole boards. Instead, parole boards are concerned with deciding the appropriate level of

89. *Id.* (internal citation omitted).

90. *See id.* at 209.

91. *See id.* at 211. The critics argued that “[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.” *See id.* at 212. *See also* BRAITHWAITE & PETTIT, *supra* note 79, at 3; Marguerite A. Driessen & W. Cole Durham, Jr., *Sentencing Dissonances in the United States: The Shrinking Distance Between Punishment Proposed and Sanction Served*, 50 AM. J. COMP. L. 623, 623 (2002). Proponents of parole, however, argue that no one supports the idea of releasing inmates on parole to commit future crimes, but unfortunately, parole boards do not have the luxury of being able to predict parolees’ future actions perfectly. *See* ABADINSKY, *supra* note 5, at 213. Parole boards face the dilemma of deciding if inmates are rehabilitated and deserving of a second chance at life or if they still pose a danger to society. *See* STANLEY, *supra* note 78, at 2.

92. ABADINSKY, *supra* note 5, at 213. In the 1988 presidential election, George H.W. Bush made an appeal to voters’ fear for their safety in making an example of Willie Horton and the Massachusetts prison furlough problem on his way to defeating Michael Dukakis. Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 13 (2003).

93. *See* STANLEY, *supra* note 78, at 3.

94. *Id.* at 68.

95. *See* ABADINSKY, *supra* note 5, at 240.

“just dessert” for each inmate, depending on the severity of the commitment offense.⁹⁶ Consequently, parole boards give rehabilitative factors little weight in suitability hearings.⁹⁷ Modern parole boards focus on deciding how much time is enough for murder and make “simplified output statements” such as “[w]e can’t let him out this soon for a crime like *that*,”⁹⁸ instead of focusing the inquiry on whether inmates are rehabilitated and ready to reenter society.

IV. THE CALIFORNIA PAROLE SYSTEM

California’s current penal system uses indeterminate sentencing for certain types of offenses, including murder.⁹⁹ As a result, the legislature has established a parole system as a means of releasing inmates.¹⁰⁰

A. CALIFORNIA PAROLE GUIDELINES

The Board administers parole suitability hearings for all inmates serving indeterminate sentences.¹⁰¹ The California Penal Code requires that a panel consisting of several members of the Board meet with each inmate one year prior to the minimum eligible parole date.¹⁰² This panel “shall normally set a parole release date,” which “shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public.”¹⁰³ But the panel does not have to set a release date if “it determines that the gravity of the current convicted

96. *See id.* Proponents of the modern parole system argue that parole boards operate less visibly than judges do and, consequently, will not face as much criticism when deciding the just desserts of an inmate. *See id.*

97. Some research suggests that parole boards focus on retributive ideals and show little concern for rehabilitative or predictive considerations when making suitability determinations. *See* STANLEY, *supra* note 78, at 60. A study of parole commissioners found that the single most important factor in deciding parole is the nature of the commitment offense. Other important backward-looking factors include a history of prior violence, prior felony convictions, and the possession of a firearm. The study found that none of the factors that the Board considers salient in determining suitability emphasizes rehabilitation or program participation, indicating that most modern parole commissioners believe in the incapacitation and modified just desserts philosophy. *See* JOHN C. RUNDA, EDWARD E. RHINE & ROBERT E. WETTER, *THE PRACTICE OF PAROLE BOARDS* 13 (1994). Another study found that the severity of the offense had the most positive correlation with the severity of the punishment. STANLEY, *supra* note 78, at 60.

98. STANLEY, *supra* note 78, at 47.

99. *See* CAL. PENAL CODE §§ 188–190 (West 2004).

100. *Id.* § 3040 (West 2004).

101. *See id.* §§ 3040–3041 (West 2004).

102. The minimum eligible parole date for convictions after August 1, 1977 is one-third of the minimum sentence. *Id.* § 3046 (West 2004).

103. § 3041(a).

offense or offenses . . . is such that consideration of the public safety requires a more lengthy period of incarceration.”¹⁰⁴ If the panel deems the inmate suitable for parole, the full Board has 120 days to review the panel’s decision.¹⁰⁵ If the full Board affirms the decision, the Governor has the authority to review and reverse that decision.¹⁰⁶ The one constraint on the Governor’s review is that the Governor’s decision must be made using the same factors and guidelines that the Board has to use when making its suitability determinations.¹⁰⁷

Title 15 of the California Code of Regulations contains administrative guidelines interpreting the Penal Code, which the decisionmakers are required to follow.¹⁰⁸ The regulations state that the decisionmakers shall consider all the relevant information available when deciding suitability. This includes inmates’ social and criminal histories; past and present mental states; base and other commitment offenses, including conduct before, during, and after the crime; attitudes about the commitment offense; postrelease plans; and any other relevant information.¹⁰⁹ In light of this information, the decisionmakers might find an inmate unsuitable, regardless of the amount time served, if they decide that the inmate would pose an unreasonable risk to society.¹¹⁰

Further, Title 15 establishes a list of circumstances tending to show unsuitability: (1) the inmate’s commitment offense was “heinous, atrocious or cruel,” (2) a previous record of violence, (3) an unstable social history, (4) previous sadistic sexual offenses, (5) negative psychological factors, and (6) improper institutional behavior.¹¹¹ Only one of these factors is forward-looking and rehabilitative.¹¹² The rest are backward-looking, retributive factors. The regulations also set forth circumstances tending to show suitability.¹¹³

Another guideline in Title 15 is the administrative matrix. The matrix sets forth the base term an inmate should serve in prison and is established

104. § 3041(b).

105. *Id.*

106. *See* CAL. CONST. art. V, § 8(b).

107. *See id.*

108. CAL. CODE REGS. tit. 15 (1990).

109. *Id.* § 2402(b) (1990).

110. § 2402(a).

111. § 2402(c).

112. The forward-looking factor is institutional behavior.

113. § 2402(d). These factors are: (1) no juvenile record, (2) a stable social history, (3) signs of remorse, (4) the crime was committed because of significant stress in the inmate’s life, (5) battered woman syndrome, (6) a lack of criminal history, (7) age, (8) realistic post-release plans, and (9) positive institutional behavior. *Id.* Only four of these factors are forward-looking.

“solely on the gravity of the base crime, taking into account all of the circumstances of that crime.”¹¹⁴ The Board is supposed to use the base term determined under the administrative matrix in calculating the release date of an inmate found suitable for parole.¹¹⁵ On one axis of the grid is the relationship between the victim and the inmate,¹¹⁶ and on the other axis are the circumstances of the crime.¹¹⁷ Within each corresponding category, there is a range of three numbers, commonly referred to as the upper, middle, and lower base terms.¹¹⁸ The upper and lower base terms are used when the panel finds factors in aggravation or in mitigation of the crime.¹¹⁹

B. CALIFORNIA PAROLE CASE LAW

The decisionmakers are also constrained by guidelines set by the judicial system. The California Supreme Court clearly recognizes that “the Board’s discretion over parole suitability decisions is neither unlimited nor immune from judicial review.”¹²⁰

114. CAL. CODE REGS. tit 15, § 2403(a) (1990).

115. *See id.* § 2411 (1990).

116. The individual categories are a participating victim, prior relationship to the victim, and no prior relationship to the victim. *See* § 2403.

117. *Id.* The individual categories include indirect, direct or victim contribution; severe trauma; and torture. *See id.*

118. *See id.*

119. *See id.* Factors considered to be aggravating are: characteristics from a higher matrix category could apply to the case at hand but a lower category is being used to set the base term; the “victim was particularly vulnerable”; there was a preexisting relationship of confidence and trust between the offender and the victim; the murder was used to preclude the victim from testifying at trial; the killing was intentional and motivated by race, color, religion, nationality, or country of origin; the inmate could have ceased the crime but chose to continue; the murder served no purpose in committing the original crime; the “corpse was abused, mutilated or defiled”; the inmate hid the body; the murder was used to cover up another crime; the murder involved the use of a destructive device or explosives; there were multiple victims; poison was used to kill the victim; the inmate killed the victim by lying in wait; the inmate induced others to participate in the crime; the inmate had a history of past criminal behavior; the inmate was in custody or on probation or parole when the crime was committed; or any other circumstances. *See* CAL. CODE REGS. tit. 15, § 2404 (1990). The factors in mitigation of a crime are as follows: characteristics from a lower matrix category apply to the facts of the case although a higher category is used to determine the base term for the crime, the crime was committed under “partially excusable circumstances that do not amount to a legal defense,” the inmate was induced by others to commit the crime, the inmate assisted the victim after the commission of the crime, the inmate played a minor role in the crime, the crime was committed in an “unusual situation unlikely to reoccur,” the crime was committed in a brief period of extreme mental or emotional trauma, the inmate experienced Battered Women’s Syndrome, the inmate had a minimal or no history of criminal behavior, and any other factors to be considered in mitigation. *See id.* § 2405 (1990).

120. *In re Ramirez*, 114 Cal. Rptr. 2d 381, 389, 560 (Ct. App. 2001).

1. *In re Rosenkrantz*

A jury convicted Robert Rosenkrantz of second-degree murder.¹²¹ The judge sentenced him to fifteen years to life, in accordance with the California Penal Code, plus a two-year sentence enhancement for the use of a firearm in the commission of the offense.¹²² In June 2000, the Board found Rosenkrantz suitable for parole,¹²³ but the Governor reversed this suitability finding in October 2000.¹²⁴

The California Supreme Court held that the standard of review for reviewing the decisionmakers' determinations is a "some evidence" standard.¹²⁵ A court may "review the factual basis of a decision . . . denying parole in order to ensure that the decision comports with the requirements of due process of law, but . . . may inquire only whether some evidence in the record before the Board supports the decision to deny parole."¹²⁶ The some evidence standard is appropriate because "[r]equiring a modicum of evidence to support a decision [to deny parole] will help to prevent arbitrary deprivations without threatening institutional interests or imposing undue administrative burdens."¹²⁷

Further, the court reaffirmed that the decisionmakers can use the severity of the commitment offense as the sole reason for denying parole.¹²⁸ It stated that "the nature of the prisoner's offense, alone, can constitute a sufficient basis for denying parole."¹²⁹ The only constraint is that the decisionmakers must demonstrate that the offense is "particularly egregious" as compared to the average offense.¹³⁰ The *Rosenkrantz* court defined egregious not as a comparison of the circumstances of the specific case to the factual situation of the average second-degree murder, but as "beyond the minimum necessary to sustain a conviction for second-degree murder."¹³¹ Further, the jury's factual findings from the criminal trial do

121. *See In re Rosenkrantz*, 59 P.3d 174, 184 (Cal. 2002).

122. *Id.*

123. Prior to this finding, there had been considerable litigation concerning past decisions by the Board, and a court order was issued requiring the Board to set a release date. "The Board made clear, however, that had it not been constrained by the order of the superior court, it would have reached a different decision." *Id.* at 188.

124. *Id.* at 189.

125. *See id.* at 205 (requiring that the factual basis of a decision by the Board be supported by "some evidence").

126. *Id.*

127. *Id.* (second alteration in original) (quoting *Superintendent v. Hill*, 472 U.S. 445, 455 (1985)).

128. *See id.* at 222.

129. *Id.* (internal citations omitted).

130. *See id.*

131. *Id.*

not bind the decisionmakers.¹³² For example, assume that at trial the prosecution failed to prove beyond a reasonable doubt that the murder was premeditated and deliberate, as required for a conviction of first-degree murder. Under the some evidence standard, the decisionmakers may still use such a factor as a reason for denying parole.¹³³ In addition, jury findings of mitigating factors do not bind the decisionmakers.¹³⁴ This ability to disregard jury findings exemplifies the unfairness of the current parole system.

2. *In re Dannenberg*

John Dannenberg was convicted of second-degree murder for killing his wife and was sentenced to fifteen years to life in a California institution.¹³⁵ At a subsequent parole hearing, the Board denied Dannenberg's parole because the commitment offense was committed "in an especially cruel or callous manner" that "demonstrate[d] an exceptionally callous disregard for human suffering."¹³⁶ Like Rosenkrantz, Dannenberg filed a habeas corpus petition challenging the Board's decision as violating section 3041 of the California Penal Code.¹³⁷ The California Supreme Court granted review to address the following question:

[A]t a parole suitability hearing . . . pursuant to . . . section 3041, must the Board . . . generally engage in a comparative proportionality analysis with respect to offenses of similar gravity and magnitude and consider base term matrices used by the Board in setting release dates and deny a parole date solely on the basis of the circumstances of the offense only when the offense is particularly egregious, or may the Board first determine whether the inmate is suitable for parole because he or she is no longer a threat to public safety and engage in a proportionality analysis only if it finds the inmate suitable for parole?¹³⁸

The court held that the Board did not have to conduct a comparative analysis before determining if the inmate was suitable, stating that "[n]one of the relevant laws states or implies that the Board must, or may, discount the public safety concerns voiced by interested persons *unless* the inmate's

132. *See id.* at 219.

133. *See id.*

134. *See id.* at 219–20.

135. *In re Dannenberg*, 104 P.3d 783, 787 (Cal. 2005).

136. *Id.* at 788.

137. *Id.* at 789. Section 3041(a) of the California Penal Code provides that a panel "shall normally set a parole release date" and it "shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public." CAL. PENAL CODE § 3041(a) (West 2004).

138. *In re Dannenberg*, 104 P.3d at 790.

crime is so exceptionally egregious as to fall outside the Board's 'uniform terms' formulae."¹³⁹ The court further stated that "[i]ndeed, the Board cannot perform its 'public input' and 'public safety' obligations if it *must* start by calculating formulaic 'uniform' parole release dates, and is prohibited from denying parole except to inmates whose crimes are demonstrably outside the norm."¹⁴⁰ Thus, the Board shall first determine if the inmate is suitable, and only if the inmate is found suitable will the Board do a comparative analysis to determine a base term.¹⁴¹

V. THE FOUR MAJOR PROBLEMS OF THE CALIFORNIA PAROLE SYSTEM

The use of California's parole statutes, regulations, and judicial decisions has resulted in four major problems with the parole system: the lack of a meaningful parole eligibility date, double counting of the gravity of the commitment offense, use of the severity of the offense as the sole criterion for denying parole, and the Board and the Governor retrying and resentencing inmates.

A. THE LACK OF A MEANINGFUL PAROLE ELIGIBILITY DATE

The first problem with the system arises out of the potential conflict between the administrative matrix and the minimum eligible parole date. An inmate might reach the minimum eligibility date and be found suitable, but may have failed to complete the term set by the administrative matrix. In this situation, the inmate would then remain incarcerated until the end of the matrix term. For example, imagine an inmate named Bob. Bob is serving fifteen years to life for a second-degree murder conviction. At Bob's initial suitability hearing, after nine years of incarceration, the Board finds that he would pose no danger to society if released, but even though he falls within the most lenient category on the matrix, the matrix still imposes a base term of fifteen years. The Board would set the release date at fifteen years minus good time credit of three years—four months for each of the fifteen years.¹⁴² The net result is that Bob, although being found suitable and eligible for parole, must still remain in prison for another three years. The administrative matrix and the minimum eligibility date conflict unfairly. One sets a theoretical statutory eligibility date while the other sets

139. *Id.* at 795.

140. *Id.*

141. *See id.* at 800.

142. *See* CAL. CODE REGS. tit 15, § 2411 (1990).

the actual eligibility date. The release date should not be calculated by the matrix rather than the eligibility date. Moreover, during the time between a suitability finding and the matrix release date, the Board, which is composed of continually changing members, can rescind its suitability finding if it can point to some evidence in favor of rescission.¹⁴³ Since the matrix determines the release date, it appears that the minimum eligible parole date is superfluous and gives inmates false hope of release.

B. DOUBLE COUNTING

Another problem with the parole system is that the Board uses the severity of the offense to determine the appropriate category for the administrative matrix, as well as to ultimately determine whether an inmate is suitable for release. The effect is that the parole system double counts the gravity of the commitment offense, a retributive factor.¹⁴⁴ Inmates are thereby greatly prejudiced.¹⁴⁵

Two different situations exemplify the problem of double counting the severity of the offense. The first occurs when the Board finds an inmate like Bob suitable at his initial hearing. This suitability finding gives due consideration to the prior criminal history and severity of the offense. Essentially, the Board has decided that after nine years of incarceration, considering the totality of the circumstances, Bob is no longer a danger to society and is suitable for release. Instead of being released on that date, however, he remains incarcerated for another three years because the matrix, which takes into account only the gravity of the offense, dictates that he serve another three years. It should not be the case that the severity of the commitment offense can dictate serving another three years under the matrix when the Board already considered the severity of the offense when it decided that Bob was suitable for parole after nine years. Another three years of incarceration on account of the severity of the offense is unjust when the suitability finding already gave due consideration to that factor.

The other situation when double counting occurs is in Dana Hill's situation. She has surpassed her base matrix term, but the Governor denied

143. See, e.g., *McQuillion v. Duncan*, 306 F.3d 895 (9th Cir. 2002) (reversing the Board's decision to revoke a suitability finding between the time the inmate was found suitable and the inmate's actual release date for lack of "some evidence" of good cause for the rescission).

144. It could be argued that there is, in effect, triple counting because the judge has already considered the severity of the offense during conviction and sentencing when determining what degree of murder the inmate was guilty of and what sentence should be imposed.

145. See *Hall v. Henderson*, 672 A.2d 1047, 1055 (D.C. 1996).

her parole based solely on the severity of her offense.¹⁴⁶ Taking into account the gravity of her crime, Dana fits into category II-C of the matrix.¹⁴⁷ This category dictates base terms of eighteen, nineteen, or twenty years.¹⁴⁸ The Board found that there were aggravating circumstances, so the upper term of twenty years should be the base term.¹⁴⁹ If one accounts for her good time credit as of her last parole hearing, however, her term should be just over fourteen years.¹⁵⁰ If the gravity of Dana's crime calls for a twenty-year base term of incarceration according to the matrix (actually only fourteen years after being adjusted for good time credits), it is hard to justify an enhanced sentence of over that amount based on solely the gravity of the offense.

As courts have stated, "It is simply irrational for seriousness of the offense to be used first to determine the appropriate guideline period and then to be used again as the stated reason for confining a prisoner beyond that guideline period."¹⁵¹ It is improper to restate factors already computed by the matrix as the reason for denying suitability.¹⁵² It should be presumed that the minimum term imposed by the court or the matrix gave due consideration to the gravity of the offense, thereby nullifying consideration of the severity of the offense in the parole process.¹⁵³

C. SEVERITY OF THE OFFENSE AS THE SOLE CRITERION FOR DENYING PAROLE

The parole system's next problem occurs when the severity of the offense is used as the sole criterion for denying parole. The most positive

146. See *supra* Section IV.A. In this situation, it could be the Board or the Governor that denies the inmate's request for parole.

147. Hill Hearing, *supra* note 20, at 98.

148. See CAL. CODE REGS. tit. 15, § 2403(c) (1990).

149. Hill Hearing, *supra* note 20, at 98.

150. Dana had sixty-five months' worth of such good time credit. *Id.* at 99.

151. Lupo v. Norton, 371 F. Supp. 156, 163 (D. Conn. 1974).

152. See Brach v. Nelson, 472 F. Supp. 569, 574 (D. Conn. 1979).

153. Hammock & Seelandt, *supra* note 25, at 544. With regard to Dana's situation it is significant that the matrix is adjustable depending on the circumstances. Although the matrix sets a base term, a longer term of incarceration might be imposed based solely on the gravity of the commitment offense, without conflicting with the matrix, because the matrix allows the base term to be adjusted upward or downward. The exact language of the regulation states that "the panel may impose the upper base term or *another term longer* than the middle base term." CAL. CODE REGS. tit. 15, § 2404(a) (1990) (emphasis added). Thus, when an inmate serves a longer sentence than the matrix dictates and the reason for the longer sentence is the severity of the offense, it is because the parole board has adjusted the matrix. Although the matrix terms are not absolute, it is hard to imagine why the matrix was created if the panel always has free reign to deviate from it. The ability to deviate from the matrix should not operate so as to swallow the base terms within the matrix.

reading of *Rosenkrantz* is that the decisionmakers may deny parole only when the commitment offense is more egregious than what is necessary to sustain a conviction for that crime. But what constitutes an egregious offense beyond what is necessary to sustain a conviction? It is important to note that California categorizes any “murder which is . . . willful, deliberate, and premeditated” as first-degree murder.¹⁵⁴ Is there a way to quantify the minimum levels of willfulness, deliberateness, and premeditation necessary to sustain a first-degree, rather than a second-degree, murder conviction? It seems an unreasonable task to quantify these attributes in a specific factual situation to determine if the inmate’s offense is more than the minimum necessary to sustain the conviction.

Consider, hypothetically, an inmate convicted of first-degree murder. In order to convict, the jury must have found that the inmate intentionally killed the victim with premeditation and deliberation.¹⁵⁵ The jury did not specify whether it found an abundance of premeditation and deliberation or if the State had barely met the beyond a reasonable doubt threshold necessary to sustain the conviction. Ultimately, there will always be factors that can be cited to make an inmate’s factual situation appear to be more than what is necessary to sustain the conviction. For example, the State might be able to point to an inmate’s motive, the murder weapon, or the inmate’s relationship to the victim. With knowledge of the minimum elements necessary to sustain the conviction, the Board could easily identify some fact that would appear to tip the scale and make the offense seem to exceed what was necessary for the conviction.

The *Rosenkrantz* court’s language could be interpreted to mean that there must be a factual situation that is more egregious than the normal factual situation needed to sustain the conviction. For example, was the inmate’s motive factually more egregious than the minimum motive needed, or was the inmate’s murder weapon factually worse than what would be needed to sustain a conviction? Again, it is difficult to determine the minimum factual situation necessary to convict for any given offense. Each case is different and each jury is different. What might have been the minimum for one case and jury might be drastically different for another case and jury.

Additionally, the test announced in *Rosenkrantz* is innately vague. For example, is murdering one’s spouse an offense that is more egregious than murdering a random person? Is using poison more egregious than using a

154. CAL. PENAL CODE § 189 (West 2004).

155. *See id.*

firearm to kill one's spouse? If killing one's spouse is more egregious than killing a random person and using poison is more egregious than using a firearm, how egregious is the offense of killing a spouse with a firearm?

Moreover, the legislature has already used the inherent distinctions of the crime of murder to create different degrees of murder. Within each of these degrees, the legislature has further defined different sentences for different circumstances. Additional distinctions within these categories are not only difficult to form but are also seemingly meaningless. By continuing to divide murder within already divided degrees, the parole system attributes significant weight to differences that the murder laws do not recognize.

A final factor to consider in using the severity of the offense to inform parole decisions is that inmates have no control over this factor once incarcerated.¹⁵⁶ Inmates' lack of control can lead to psychological difficulties that will impact the safety of the inmates, prison guards, and prison staff.¹⁵⁷ Commentators point out that "[t]he inmate's conduct and cooperation while in prison may depend on his post-institutional expectations of success or failure on parole."¹⁵⁸ If this is true, the consequences on the conduct of inmates could be devastating if they feel that because of the severity of their commitment offenses, the decisionmakers will never find them suitable for parole. In addition, "institutionalization affects the attitude of most people toward life and their ability to make an adequate adjustment in the free community."¹⁵⁹ If inmates face prolonged periods of incarceration that they have no power to decrease, it is likely that the negative effects of incarceration will intensify.

D. THE RETRYING AND RESENTENCING OF INMATES BY THE BOARD AND THE GOVERNOR

This last major problem with the parole system is that by allowing the decisionmakers to consider facts outside those found by the jury, they in effect retry and resentence inmates. For example, if the State tried an inmate for first-degree and second-degree murder, but the jury acquitted the inmate of first-degree murder, the acquittal implies that the jury did not believe beyond a reasonable doubt that there was premeditation or

156. Inmates cannot go into the past and change their behavior; all they can do is use the rehabilitation programs offered to them to change the way they will act in the future.

157. See DUFFEE & FITCH, *supra* note 48, at 232–33.

158. *Id.* See also Hammock & Seelandt, *supra* note 25, at 548–49.

159. DUFFEE & FITCH, *supra* note 48, at 234.

deliberation. Although judges will properly sentence the inmate for second-degree murder, the decisionmakers can disregard the jury's findings and make its suitability findings as if the conviction were for first-degree murder. The decisionmakers do this by denying parole based solely on the severity of the offense, until inmates have served the minimum sentences they would have received if convicted of first-degree murder. Inmates will not be eligible for parole until they have served the specific amount of incarceration appropriate for the degree of the crime the decisionmakers believe is proper, rather than for the degree of crime the jury found. Although they are not allowed to relitigate or resentence inmates, the decisionmakers often let personal opinions and political beliefs influence their suitability findings.¹⁶⁰

Allowing the decisionmakers to relitigate a case strips the weight of the jury conviction and creates the possibility of collusion between the district attorney's office and the decisionmakers, granting the executive branch free reign to implement its policies.¹⁶¹ If the district attorney's office were looking to improve its conviction rates, it could attempt to ensure a conviction by charging the suspect with a lesser crime that is easier to prove. The decisionmakers, part of the executive branch, could use the same evidence standard and consider the inmate's suitability in light of the higher crime for which the inmate was not actually convicted. This system has the effect of increasing conviction rates by prosecuting easier crimes to prove, while imposing inflated sentences for those crimes, thereby making politicians look "tough on crime." Thus, both the district attorney's office and the decisionmakers achieve their respective policy goals. This procedure severely undermines the purpose of using juries as fact finders, as it allows—or even encourages—the decisionmakers to overreach the jury's findings. Under the current system, the question to the jury should simply be, "[D]o you believe the person charged killed the victim?" so that the decisionmakers could then determine any other factual questions affecting sentencing during the parole proceedings.

Moreover, the due process protection that the reasonable doubt standard affords criminal defendants is severely undermined if the decisionmakers who impose the actual sentence use a some evidence standard. By allowing the decisionmakers to use a lesser standard, the system is in effect rendering any factual determination that the jury makes beyond guilt or innocence mere surplusage. The Supreme Court recently

160. See Hammock & Seelandt, *supra* note 25, at 561.

161. This Note does not intend to imply that there is corruption within the system, but rather, it intends to show that the possibility of such collusion exists.

held that the imposition of an enhanced sentence under the mandatory federal sentencing guidelines was unconstitutional where the enhancement was based not on facts admitted by the defendant or found beyond a reasonable doubt by the jury at trial, but rather on facts later found by the sentencing judge under a preponderance of the evidence standard.¹⁶² This is similar to the situation inmates encounter when they go before the Board. The inmates may be denied parole because the Board is permitted to use the some evidence standard, a less stringent standard compared to reasonable doubt. The Board is essentially extending an inmate's sentence, in some instances by decades, based on facts that were not found by a jury beyond a reasonable doubt.¹⁶³

VI. A NEW VISION FOR THE PAROLE SYSTEM

The Georgia Board of Pardons and Paroles believes that “[j]ustice demands that punishment should be tailored to fit both the offense and the offender.”¹⁶⁴ This Note proposes a system of sentencing and parole that can achieve this same goal.

A. RESTRUCTURING THE SENTENCING AND PAROLE SYSTEM

As California has many of the components of a proper parole system already in place, it is only a matter of tweaking the existing components to achieve an optimal system. Adjustments at the legislative and judicial levels, as well as adjustments to the parole eligibility procedures and the parole board would go a long way toward restoring the parole system to its original ideals.

1. Legislature

Under the hybrid theory, on which this proposed system is based, the choice of what punishment scheme should be used is left to the

162. *United States v. Booker*, 125 S. Ct. 738, 747–51 (2005). *See also* *Blakely v. Washington*, 542 U.S. 296 (2004).

163. *Booker's* holding cannot be extended to inmates at parole hearings because *Booker* is founded on the Sixth Amendment, which does not apply to inmates before a parole board. Although not a constitutional violation, the situation faced by inmates appearing before a parole board leads to the same result that occurs in *Booker* and raises the same normative concerns. *See Booker*, 125 S. Ct. at 738.

164. ABADINSKY, *supra* note 5, at 240.

legislature.¹⁶⁵ This Note proposes an indeterminate sentencing system, in which the legislature would establish a sentencing matrix analogous to the administrative matrix currently used by the Board.¹⁶⁶ Because the legislature justifies the use of punishment based on its deterrent effect, the legislature should designate the minimum sentence for a particular crime to correspond to the level of punishment that it believes will deter rational individuals from breaking the corresponding law.¹⁶⁷ In addition, the legislature should require the Board to consider only rehabilitative, forward-looking factors when determining suitability for parole.

2. Judicial Branch

Judges, using only the facts found by the jury, are responsible for applying the matrix to particular cases. They locate the appropriate category for the offense depending on the circumstances of the crime and sentence individuals to the middle term unless they decide that the facts found by the jury beyond a reasonable doubt call for the imposition of the lower or upper term of the matrix.¹⁶⁸ The term found by the judge should serve as an inmate's minimum term of incarceration before that inmate may be eligible for parole.¹⁶⁹ The matrix category and the use of an upper term would be appealable, under the abuse of discretion standard, on direct appeal.

Judges should continue to consider the severity of the offense and prior criminal history when choosing a category and deciding whether the lower, middle, or upper term should apply during sentencing. Judges are in the best position to make this decision because they have observed the witnesses and seen the evidence, and they are familiar with the intricacies of each case. Judges, by nature, look at backward-looking factors when making decisions of culpability, so it falls within the judge's realm of expertise to apply the matrix or guidelines that the legislature has created. Although judges use retributivist principals in implementing the matrix,

165. Because the legislature is the branch of government that defines the laws of the state, it should define the minimum punishments for violating those laws. The import of laws is inextricably linked to the punishment imposed for violating them.

166. Within each corresponding category, there should be a range of terms that the judge may impose, depending on the circumstances of the crime. The legislature could still create a category of life sentences without the possibility of parole for particularly heinous crimes.

167. This would limit the legislature from attaching too harsh a punishment. For instance, there would be no need to impose the death penalty for second-degree murder because a rational individual would be deterred by a lesser penalty.

168. For the judge to depart from the middle term, the circumstances of the offense would have to conform to the aggravating and mitigating factors established by the legislature.

169. The minimum term would be the term imposed by the judge minus any good time credits.

they are constrained by the overall utilitarian justifications for the sentencing matrix.

3. Parole Eligibility

Inmates should be required to serve the minimum terms judges prescribe at sentencing hearings. Postconviction credit, also called “good time credit,” is the only means by which inmates should be able to reduce these terms. If inmates behave well while incarcerated, they should earn time off their minimum terms.¹⁷⁰ Their counselors within the institutions should be responsible for awarding and tracking inmates’ postconviction credits and should adjust the parole eligibility dates of inmates accordingly.

Postconviction credit creates an instant psychological incentive for inmates to behave appropriately while incarcerated. Without the use of postconviction credits, inmates would not receive any rewards for good behavior while incarcerated. With postconviction credits, the inmates know that good behavior during the early years of incarceration is meaningful and can contribute to earning an earlier parole date.

4. The Parole Board

The Board should retain the power to make suitability findings but should not be allowed to consider retributive, backward-looking factors. The Board should be allowed to consider only rehabilitative, forward-looking factors. The Board should be able to consider inmates’ programming, treatment, release plans, job skills, letters of support, and psychological reports. But they should no longer be permitted to consider inmates’ offenses and prior histories.

Under this system, it makes sense for the Board to consider only rehabilitative factors because by the time inmates are eligible for parole, they have already served the time that was imposed in light of the severity of their offenses. Further, the Board’s determination occurs years after the trial with only the transcripts and the probation officer’s report detailing the crime. The Board has not heard or seen any of the witnesses and cannot judge their credibility, nor has it seen any of the evidence first-hand. The Board does, however, have the ability to look at the person the inmate has strived to become over the years of incarceration. The Board’s concern

170. Good behavior is determined by the number of infractions the inmate receives while incarcerated. Each inmate who is free of disciplinary action for one year will earn one unit of post-conviction credit. The actual value of these credits will be determined by the legislature. This Note will assume that the good time credit would be awarded in a fair and nonarbitrary manner.

should not be with inmates as they were at the time of the offense, but rather with inmates' present states of mind. Allowing the Board to focus on backward-looking factors corrupts its view as to whether the inmate, in the present, can operate as a law-abiding person in society. Retributive factors have no logical bearing on the Board's consideration of inmates' rehabilitation and, therefore, should not be considered.

If the Board finds an inmate unsuitable, it should be required to explain its decision in detail with reference to each of the forward-looking factors. The Board should also furnish an explanation of what the inmate could specifically do over the next few years to work toward a positive suitability finding.

The Governor should have no power to reverse the Board's decision. This would allow the Board's suitability finding to be final and would protect the Board's determination from being overturned for the Governor's political gain. If the Board finds an inmate unsuitable, however, the inmate should be allowed to file a habeas corpus petition in state court, explaining why the Board's finding was erroneous. Judicial review of the Board's denial would serve to prevent or curb any corruption or abuse of power by the Board.

B. IMPLICATIONS OF THE NEW SYSTEM

This new system alleviates many of the problems with modern parole and strives to achieve the goals of the original parole system. It strives to return to the origins of the institution of parole—"Maconochie's emphasis was always upon the desirability of a prisoner's knowing where he stood, and what he had to do to gain his liberty."¹⁷¹ In this system, inmates would know when they will be eligible for release and what they need to do to achieve release. If inmates use their incarceration as a means of rehabilitating themselves, the penal system should reward them with parole. If inmates choose not to participate in programming or therapy, the State should not release them prior to the expiration of their full sentences.

The minimum eligible parole date would gain meaning under the new system. Under the proposed system, the legislature would dictate the actual minimum sentence that an inmate would serve. If the legislature were to determine that a sentence of fifteen years was necessary to deter the most lenient circumstances of second-degree murder, any inmate falling within that category would serve fifteen years in prison before becoming eligible

171. HUSSEY & DUFFEE, *supra* note 53, at 67.

for parole.¹⁷² Once an inmate reached the parole eligibility date, that inmate would have a suitability hearing, and if the Board were to find the inmate suitable, the inmate would be released. Unlike the existing system, the proposed system would not deceive inmates by finding them suitable, delaying their release dates, and then possibly rescinding the suitability finding before the release date. The inmates would know exactly when they could go before the Board and have the possibility of actual release.

The new system would also correct the current system's double-counting problem. The severity of the commitment offense would be considered only once—when the length of the inmate's incarceration was initially determined. Judges, when considering the minimum terms that inmates must serve, would consider the severity of the offense, so once inmates have surpassed their minimum terms, they would have completed the necessary time that corresponds with the severity of the crime. Under the new system, the Board would not be allowed to consider the severity of the commitment offense and could no longer use it as means of finding someone suitable. Because the severity of the offense is an unchanging and unchangeable factor, using only rehabilitative factors would allow inmates to control their potential for parole by controlling their rehabilitation, rather than waiting for the Board to determine that they have served the appropriate amount of time for their crimes.

Another problem the new system would curtail is the inherently vague litigation over what makes one murder more egregious than another. Although there would be appellate review of the trial judge's application of the matrix or imposition of a higher or lower term, any litigation should concentrate on the trial judge's conformity with concrete guidelines, rather than the abstract questions of what is an "average" versus an "egregious" murder. Appellate review could be used simply to analyze the trial judge's appreciation for such elements as relationship with the victim, number of victims, level of participation, and other general circumstances, rather than attempting to compare the facts of the case to the facts of all other similar cases.

Lastly, the new system would alleviate the problem of discrediting the jury verdict. As the Board would no longer be concerned with backward-looking factors, it would have no need to relitigate the case. The Board should be concerned with only the conduct of inmates after they have been incarcerated. Further, the judge could not consider facts during sentencing that juries had already determined when deciding if aggravating

172. The eligibility date also considers the inmate's good time credit.

circumstances were involved. For example, if the jury in a particular case found that there was no premeditation, then there should be no further consideration of premeditation when sentencing the inmate.¹⁷³

Thus, this new system would alleviate the problems of the old parole system by setting meaningful minimum eligibility dates, preventing double-counting of the severity of a commitment offense, and reinstating the jury findings as conclusive regarding the factors of the offense.

C. CRITICISMS OF THE PROPOSED SYSTEM

Although the proposed system would address many of the problems the former system created and would realign parole with the ideals under which it was created, it would also raise potential problems. These problems include a requirement of legislative action to set the plan in motion, the possibility of an artificially high sentencing matrix, potential influence from the political system, and a lack of meaningful habeas review.

The first weakness is that legislative action is necessary for the initiation of this system. Today's political climate requires that politicians be tough on crime to remain in office.¹⁷⁴ The restructuring of parole—returning it to a system of rehabilitation—might be seen by society as being soft on crime and putting the public at risk if the new system allows dangerous inmates to be released back into society.¹⁷⁵ These fears, however, could not be more misplaced. Under determinate sentencing, inmates are released at the end of their sentences, without regard for their current psychological states. If inmates have disciplinary problems and have done nothing to alter their criminal tendencies, the State still releases them when their sentences expire. How does this provide any assurance of safety for society? The belief that parole is soft on crime is illogical. Parole, in reality, provides more protection for society because it releases rehabilitated inmates while continuing to incarcerate dangerous individuals. Politicians advocating for an efficient system of parole are actually promoting society's safety more effectively than their counterparts arguing

173. Under the new system, the appearance of collusion among the executive agencies is eliminated.

174. Commentators note that “[a] tough-on-crime rhetoric now dominates the political conversation in the United States, making it politically costly for lawmakers to suggest reducing sentences or mitigating penal sanctions in any other manner.” Driessen & Durham, *supra* note 91, at 624.

175. Critics argue that parole “may actually be facilitating hardened ex-offenders’ regression into a life of crime and violence upon their release.” Hammock & Seelandt, *supra* note 25, at 528.

for the supposedly tough on crime determinate sentencing. Moreover, the use of indeterminate sentencing and parole does not reduce inmates' incarceration lengths compared to inmates' incarceration lengths under determinate sentencing,¹⁷⁶ but it does provide society with protection from the release of potentially dangerous individuals.

Second, if a legislature implements the proposed system, another potential weakness is that minimum sentences might be artificially high because of the transition from the old system. For instance, the penalty for second-degree murder in California is generally fifteen years to life,¹⁷⁷ and when the legislature transfers systems, it is unlikely that the new minimum sentences will be lower than fifteen years.¹⁷⁸ The legislature might believe that a shorter term could properly deter rational members of society from violating the law, but as a matter of political strategy, politicians would probably keep the minimum term at the artificially high level.

Next, the political process might also create problems after the system is put into practice, acting as a constraint on the legislature from imposing overly harsh minimum terms, if the public sentiment were against harsh sentence lengths. The public could use its voting rights to remove legislators who wish to create excessive sentences, such as imposing the death penalty as punishment for all crimes. More likely, however, the political process could exacerbate the problem of artificially high sentences. The public might demand sentence lengths beyond those needed to deter members of society from violating the law. Politicians concerned with reelection would likely comply with society's demands, rather than considering what an effective system requires. Further, the political process also has an effect on judges. Some state courts have an elected judiciary, whose members might face the same pressures as the legislators. Judges, not wanting to appear soft on crime, might try to depart from the guidelines and impose the upper terms, even when they were not warranted.

There would be no way to effectively shield the proposed system from the political process. Nevertheless, the political process would influence the proposed system less than it influences the current system. Currently, the legislature has shielded itself from public scrutiny by delegating the parole process to the Board. The Board routinely denies parole to qualified inmates, and when the Board does find an inmate suitable, the Governor,

176. See DUFFEE & FITCH, *supra* note 48, at 3.

177. CAL. PENAL CODE § 190 (West 2004).

178. Seeing a lowering of minimum sentences from the existing terms, the public may conclude that the politician was being soft on crime.

attempting to appear tough on crime, often reverses the Board's decision. The new system would not allow the Governor to review suitability findings, which would remove significant political pressure from the system. Moreover, although the political process might affect the new system by setting artificially high minimum sentences, when inmates finish serving their minimum sentences, they would be considered for parole with fair guidelines. The current system might result in lower minimum sentences, but political pressure likely results in inmates being treated more unfairly once eligible for parole than they would be treated under the proposed system.

Another criticism of the proposed system is that appellate courts rarely grant writs of habeas corpus, so although inmates would theoretically have access to judicial review of parole decisions, in reality, the Board would go unchecked. Again, while the proposed system has no way to protect itself from this problem, the proposed system would probably be better in this respect than the current system. Under the new system, if the Board found an inmate unsuitable, it would have to do so by showing that the inmate does not comply with some rehabilitative factor. For example, the inmate might have a bad institutional record, a bad psychological report, or weak release plans. Given that these factors are relatively concrete, it would be harder for the Board to abuse its power. For example, the Board would be hard pressed to show that Dana Hill does not comply with any of the above factors. In the present system, when the Board feels that an inmate should not be released, it can deny parole under the guise of the gravity of the offense guideline. This makes it more difficult for an inmate to show that the Board abused its discretion. Although the new system could not directly affect the rate of writs granted by the trial courts, it could reduce the number of writs that must be filed by constraining the discretionary and loose guidelines that the Board would be allowed consider.

VII. CONCLUSION

Dana Hill is a victim of the draconian modern parole system. She has used her twenty-two years of incarceration as a means of bettering herself. Despite the fact that she is considered rehabilitated and eligible for parole, she remains incarcerated. Unfortunately, her story is not unique. The modern parole system is plagued with problems that inhibit its effective use. This Note proposes the restructuring of the parole system to fix the problems experienced under the present system. Although the proposed system would not perfect the institution of parole, it would make great improvements to the system. Most importantly, it focuses on protecting

society, while also treating inmates fairly. This would lead to a more effective penal system and, in turn, to a society that treats its inmates with the fairness that a democratic society should exhibit.